

**§ 10.320 Definitions.**

(a) *Fault* as used in the term “without fault” in 5 U.S.C. 8129(b) and § 10.321(c) of this subpart applies only to the individual who has received a payment in his or her own name or on behalf of a beneficiary. Although the Office may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Office seeks to recover the overpayment from liability for repayment if such individual is not without fault.

(b) *With fault*. In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who:

(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

(2) Failed to furnish information which the individual knew or should have known to be material; or

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

(c) *Without fault*. Whether an individual is “without fault” depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return payments which were not due, and ability to comply with any reporting requirements (e.g., age, comprehension, memory, physical and mental condition). Although “without fault” is not limited to the overpayment circumstances described below, an individual is “without fault,” except as provided in paragraph (b) above, if it is established after consideration of all the factors stated above that failure to report an event that would affect compensation benefits or

acceptance of an incorrect payment was due to one of the following:

(1) The individual relied on misinformation given to him or her (or his or her representative) by an official source within the Office (or other governmental agency which the individual had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Act or the regulations pertaining thereto; or

(2) The Office erred in calculation of cost-of-living increases, schedule award length and/or percentage, and loss of wage earning capacity, unless the claimant had knowledge of the calculation errors.

(d) *Degree of care*. An individual will be “with fault” if the Office has evidence which shows either a lack of good faith or failure to exercise a high degree of care in reporting changes in circumstances which may affect entitlement to or the amount of benefits. As indicated in paragraphs (b) and (c) of this section, the degree of care expected of an individual may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize that he or she is being overpaid. Accordingly, variances in the personal circumstances and situations of individual payees are to be considered in determining whether the individual exercised the degree of care necessary to warrant a finding of “without fault.”

**§ 10.321 Recovery of overpayments.**

(a) Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual. In the event such individual dies before such adjustment has been completed, a similar adjustment shall be made by decreasing subsequent payments, if any, payable under this Act with respect to such individual's death.

(b) Where there are no further payments due and an overpayment has

been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same.

(c) There shall be no adjustment or recovery under paragraph (a) or (b) of this section by the United States in any case when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.

(d) Before adjusting future payments or otherwise seeking to recover an overpayment, the Office shall provide the individual with written notice of:

(1) The fact and amount of overpayment;

(2) Its preliminary finding of whether the individual is at fault in the creation of the overpayment;

(3) The individual's right to inspect and copy Government records relating to the overpayment;

(4) The individual's right to request a pre-recoupment hearing within 30 days of the date of written notice of overpayment for the purpose of challenging the fact or amount of the overpayment, the preliminary finding of fault, or for the purpose of requesting waiver;

(5) The individual's right to submit additional written evidence within 30 days of the date of written notice of overpayment for the purpose of challenging the fact or amount of the overpayment, the preliminary fault finding, or for the purpose of requesting waiver.

(e) Additional evidence must be submitted, or a pre-recoupment hearing requested, within 30 days of the Office's written notice to the individual. Failure to exercise the right to a pre-recoupment hearing within 30 days of the date of notice of overpayment shall constitute a waiver of that right.

(f) Pre-recoupment hearings shall be conducted in all matters in exactly the same manner as provided in §10.131 through §10.137.

(g) When an overpayment exists because a claim was accepted in error, or because benefits were otherwise denied

or terminated, the Office representative shall determine any and all issues raised at the pre-recoupment hearing, including those regarding the correctness of the decision to deny or terminate compensation. If an employee requests a pre-recoupment hearing as provided by this section with respect to an overpayment, and also requests a hearing as provided by 5 U.S.C. 8124(b) with respect to the decision denying or terminating benefits and resulting in the overpayment, both requests for a hearing shall be combined and one hearing held on any and all issues.

(h) If additional written evidence is not submitted, or a hearing requested, within the 30-day period, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The final decision concerning an overpayment, whether rendered subsequent to a pre-recoupment hearing or in the absence of the submission of additional written evidence, is not subject to the hearing provision of 5 U.S.C. 8124(b) nor the reconsideration provision of 5 U.S.C. 8128(a). An individual aggrieved or adversely affected by a decision concerning an overpayment may request review by the Employees' Compensation Appeals Board.

(i) A copy of the final decision concerning an overpayment will be sent to the individual from whom recovery is sought, the individual's representative, and the employing agency.

[40 FR 6877, Feb. 14, 1975, as amended at 53 FR 11594, Apr. 7, 1988]

**§ 10.322 Waiver of recovery—defeat the purpose of the subchapter.**

(a) *General.* Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and